THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EPD/PLC:PWlb1417509

1 December 2017

Director, Legislative Updates
Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

By email: Regulation.Review@planning.nsw.gov.au

Dear Sir/Madam,

Review of the *Environmental Planning and Assessment Regulation 2000*

The Law Society of NSW appreciates the opportunity to comment on the review of the *Environmental Planning and Assessment Regulation 2000* ("Regulation"). The Law Society's Environmental Planning and Development Committee has contributed to this submission and it is also supported by the Property Law Committee.

Background to the review

This review follows proposed changes to the Regulation's parent Act, the *Environmental Planning and Assessment Act 1979* ("Act")[1]. While the Act provides the overarching framework for the planning system in NSW, the Regulation supports the day-to-day requirements of the system.

The Regulation is the Act's primary subordinate legislation. It commenced on 1 January 2001 and it has been amended on over 40 occasions since then. This review affords an opportunity to remove any unnecessary complexities and outdated rules.

The Department has prepared an issues paper that outlines the key operational provisions of the Regulation. It seeks:

- stakeholder views on known issues with the current Regulation; and
- stakeholder feedback to help identify other issues, including suggestions for updating and improving the function of key operational provisions and reducing unnecessary regulatory and administrative burdens.

[1] The Environmental Planning and Assessment Amendment Bill 2017 passed Parliament on 15.11.17 and received assent on 23.11.17.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

Addressing known issues

The Regulation has not been comprehensively reviewed since it came into effect.

The issues paper identifies a number of known issues with the current Regulation and includes suggestions to improve the function of key operational provisions and reduce complexity and administrative burdens. We support a number of the proposals to address these issues.

1. Issues relating to planning instrument provisions

Notification of determination

Clause 10A of the Regulation provides that where a council does not support a written request for the preparation of a planning proposal under Part 3 of the Act, it must notify the person who made the request, in writing as soon as practicable. We support the suggestion made in the issues paper, that consideration could be given to prescribing a time period for giving this notice, to provide greater certainty to the person applying.

Requirements for exhibition of development control plans ("DCPs")

Clause 21 of the Regulation allows a plan to be approved with any "such alteration as the council thinks fit". We support consideration being given to a requirement for the re-exhibition of an amended plan in certain circumstances; for example, where amendments substantially alter the form or objectives of the draft DCP.

2. Issues relating to development assessment and consent provisions

Provision for a modification application to be rejected or withdrawn

A consent authority may reject a development application in certain circumstances, as set out in cl 51. An applicant may withdraw a development application at any time prior to its determination, in accordance with cl 52.

These provisions do not currently extend to modification applications. We support extending the application of these provisions to modification applications, to provide for the formal rejection or withdrawal of these applications in appropriate circumstances.

Locating public exhibition requirements

The mandatory minimum exhibition periods for development applications and for a number of different plans, are now included in the same section of the Act[2], as a result of the recent amendments. This has made them more easily accessible.

We note that currently, public exhibition requirements which apply to other specific types of development are spread across a range of different instruments, including various State Environmental Planning Policies and the Regulation.

We support the streamlining and consolidation of these public exhibition requirements into the Regulation for greater clarity and ease of access.

---

[2] Environmental Planning and Assessment Amendment Bill 2017 Sch 1, Div 2.

Requirements for notices of determination

These requirements are set out in cll 100 and 101 of the Regulation. It is suggested in the issues paper that these requirements are overly prescriptive and place a significant burden on consent authorities where submitters are required to receive a notice of determination by post where they have not indicated that they can be contacted by email in accordance with s 153(1)(c) of the Act. It is suggested that the review could look at streamlining these requirements and allowing for this notification to occur by email, with applicants and submitters invited to view the notice of determination and the most relevant documents online by the Planning Portal.

Although we acknowledge the administrative burden that the suggestion aims to address, we are concerned that this measure might effectively exclude some community members from accessing this information i.e. those submitters who do not provide an email address at all. We suggest that rather than posting the notice of determination and relevant documents, a notice could be posted to those submitters who have not supplied an email address, stating that the notice of determination and relevant documents can be viewed online on the Planning Portal.

We also note the recent amendments to the Act, which require all decision-makers to publish reasons for their decisions. We strongly support this practice as it provides greater transparency and will indicate how the community's views may have been taken into account. We support a requirement for reasons to be included in the notice of determination to achieve the same end.

Notification of internal review decision

Currently, the council is required under cl 123G to provide written notice, as soon as practicable, of the result of an internal review to the applicant. We support extending this requirement to provide such written notice to any person who made a submission, in addition to the applicant.

Classes of designated development

The review provides an opportunity to consider whether the current classes of designated development in Schedule 3 remain appropriate and to review the level of alignment between these activities and those listed in Schedule 1 of the *Protection of the Environment Operations Act 1997* ("POEO Act").

The Law Society supports amendment of the definition of "waterbody" in cl 38 of Schedule 3 to include ephemeral watercourses.

We also consider that the definition of "electricity generating stations" in cl 18 should be amended. An updated definition of energy generation and associated infrastructure such as power storage batteries, should be included to capture new energy technologies and to better align with definitions in the POEO Act. We consider that the alignment of relative definitions in the Regulation with the POEO Act and the *Water Management Act 2000* would assist consent authorities, communities and commercial agricultural developers.

3. Environmental assessment

Issues relating to environmental assessment provisions

Clause 228 of the Regulation outlines the factors that a public agency must take into account when considering the environmental impacts of their activities pursuant to s 115 of the Act.

There is no legislative requirement for these assessments to be recorded on a register or to be made publicly available. As a result, the issues paper notes that it can be difficult for the public (and other agencies and councils) to ascertain whether a review of environmental factors has been undertaken or to ascertain the outcome of the assessment.

We support the introduction of a requirement for public agencies to make their environmental assessments publicly available, to improve transparency.

4. Fees and charges

The review of the Regulation provides an opportunity to examine whether the existing fee regime remains appropriate. To assist with this review, the Department is seeking feedback on all fees and charges set out in Part 15 of the current Regulation.

Planning certificates

The Law Society notes that councils take differing approaches to the operation of subsections 149 (1) and (2) where an application for a planning certificate relates to multiple lots. Some councils issue a single certificate relating to all the land the subject of the application. Other councils will issue one certificate for each lot or lots contained in a rating notice. Still others will issue one certificate per lot. Where multiple certificates are issued, it is often the case that the only detail which differs between certificates is the lot number. It is inefficient to attach copies of multiple certificates to contracts for sale to comply with vendor disclosure obligations. It is also costly, as councils which issue multiple certificates will charge multiple fees, which can add significantly to the cost of contract preparation.

The Law Society considers that section 149(2) should be amended to clarify that only one certificate is to be issued. Consideration will need to be given as to whether the prescribed fee should be adjusted to address, for example, circumstances where the Schedule 4 prescribed matters differ across the parcels.

Regular reviews

The Law Society acknowledges that the fees imposed by councils need to be regularly reviewed so that they can properly fund their activities. We note that the fee for planning certificates (s149 (2) certificates), for example, has only been increased once since 1989 from $40.00 to $53.00, in 2011[3], which remains the current fee.

[3] The fee increase was implemented with the commencement of the *Environmental Planning and Assessment Further Amendment Regulation* 2010, which came into effect on 1 July 2011.

5. Issues relating to development contribution provisions

Practice notes for voluntary planning agreements ("VPAs")

The issues paper notes that while cl 25B(2) provides for the Secretary to issue practice notes to assist parties in the preparation of VPAs, the Regulation does not require consideration of these practice notes.

We support amending the Regulation to ensure planning authorities and developers consider practice notes when parties enter into a VPA.

We also support the Regulation providing that all draft and final planning agreements are required to be exhibited on the Planning Portal, to improve accessibility and transparency relating to these agreements. We consider that this requirement should apply in addition to the requirement for the planning authority to maintain a register of final planning agreements and have hard copies available for public inspection at their offices.

Council policies on VPAs

We support the introduction of a regulatory provision to formalise a requirement for planning authorities to publish policies and procedures to guide and explain the use of VPAs. This will increase accountability and transparency in relation to the public benefits that are funded and delivered through VPAs, and would provide greater certainty to developers.

6. Planning certificates

The Law Society is very interested in improving the delivery of planning information through the planning certificate. We have a long standing interest in this area. We consider that there is potential to update the certificate and make it an appropriate and relevant document for use by all stakeholders in the conveyancing process as well as providing an opportunity for developers and other users to obtain reliable information about a range of issues in the planning process.

Role of the planning certificate

Planning certificates play a major role in the vendor disclosure and warranty legislation applying to the sale of residential land in NSW. Section 52A(2)(a) of the *Conveyancing Act 1919* requires that a vendor under a contract for the sale of land "shall before the contract is signed by or on behalf of the purchaser, attach to the contract such documents, or copies of such documents, as may be prescribed".

The prescribed documents, which are specified in Schedule 1 to the *Conveyancing (Sale of Land) Regulation 2017,* include a "section 149 certificate". A section 149 certificate is defined in that Regulation to mean:

> a certificate issued under section 149 (2) of the *Environmental Planning and Assessment Act 1979*, but does not include a certificate referred to in clause 279 (2) of the *Environmental Planning and Assessment Regulation 2000*.

The consequence of a failure to comply with the requirement to attach a planning certificate to the contract for sale of land is that the purchaser may rescind the contract, in the circumstances set out in clause 17 of the *Conveyancing (Sale of Land) Regulation 2017.*

The policy underlying the legislation is to require the vendor to provide certain information which the purchaser can rely on in order to proceed to exchange contracts without the need to carry out his or her own inquiries and in this way expediting exchange and minimising the opportunities for gazumping.

The vendor warranties contained in Schedule 3, Part 1 of the *Conveyancing (Sale of Land) Regulation 2017* include the following:

> (1) The vendor warrants that, as at the date of the contract and except as disclosed in the contract:
> ...
> (c) the section 149 certificate attached to the contract specifies the true status of the land the subject of the contract in relation to the matters set out in Schedule 4 to the *Environmental Planning and Assessment Regulation 2000,...*

It is important to recognise that the planning certificate is primarily a disclosure document which provides information about the "true status" of the land. As such, it is a snapshot of the land use restrictions applicable to the property as at the date of the certificate.

What information should be included on the planning certificate?

This certificate is the delivery system for planning information for many members of the local community. It is the means by which a potential purchaser obtains information about strategic planning and development controls applying in their new area. A potential purchaser will not have participated in the community consultation that set the parameters for planning controls in their new local area and will not have objection rights in relation to most development that may affect his or her property.

We support the continued inclusion of the items currently listed in Schedule 4 of the Regulation.

We would be happy to meet with representatives of the Department to discuss these items in detail.

Section 149(5) certificate

Subsection (5) currently provides:

> (5) A council may, in a planning certificate, include advice on such other relevant matters affecting the land of which it may be aware.

This section creates difficulties in practice. The quantity and utility of additional information varies markedly from council to council. In some cases, members of the Law Society have reported that the additional information provided was limited to a statement that council had resolved not to provide any additional information pursuant to section 149(5).

The inability to obtain the additional information without also applying for a section 149(2) and (5) certificate is frustrating to purchasers whose vendors have complied with their disclosure obligations by obtaining the certificate issued under section 149(2). In many cases, information provided under subsection (5) after exchange of contracts will provide no remedy to a purchaser.

The Law Society would prefer that information of relevance to applicants for certificates be included in the certificate issued under subsection (2). Section 149(5) would, in this event, become redundant and should be repealed.

Should the Regulation prescribe the language or format in which information should appear?

The Law Society strongly supports the prescription of a planning certificate template. Ideally, the certificate should be framed so that the majority of questions can be posed in a form that admits only a "Yes" or "No" answer. As the planning system moves to adopt the standard instrument state-wide, there should be no reason for different certificates being provided in different forms.

Could hard copy planning certificates be replaced with an online system through the NSW Planning Portal?

The Law Society would support the delivery of planning certificates through the NSW Planning Portal, on the basis that such delivery is likely to ultimately provide a speedier and more efficient service.

Commencement of the new regulation

We recommend that sufficient lead time be allowed between the publication of the amended regulation on the NSW Legislation website and its commencement. This will give all stakeholders, including councils, sufficient time to prepare for its implementation.

Further consultation

The Law Society appreciates that many of the matters raised will require further discussion and input and welcomes the opportunity to remain closely involved in the process to ensure a better outcome for all users of planning information. Once again, thank you for the opportunity to provide these comments.

Please do not hesitate to contact Liza Booth, Principal Policy Lawyer, on (02) 9926 0202 if you would like to discuss this in more detail.

Yours faithfully,

Pauline Wright
President